Supreme Court, U.S.
FILED
MAY 27 1992
OFFICE OF THE CLERK

NO. 91-1732

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

MARTIN HOWARD SAMMONS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BY: RONALD E. STEINBERG
Assistant Defender
State Appellate Defender Office
1200 Sixth Ave.
Third Floor, North Tower
Detroit, Michigan 48226
(313) 256-2814

Counsel for Respondent
Martin Howard Sammons

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE MICHIGAN COURT OF APPEALS ERRED IN HOLDING THAT THE INTERESTS THE CONFRONTATION CLAUSE PROTECTS, TO ENSURE THE RELIABILITY OF EVIDENCE, SHOULD APPLY AT A MICHIGAN HEARING WHERE THE DEFENSE OF ENTRAPMENT IS LITIGATED BEFORE A TRIER OF FACT.

II. WHETHER THE MICHIGAN COURT OF APPEALS WAS CORRECT IN HOLDING THAT EVEN IF THERE WERE LEGITIMATE CONCERNS FOR THE SAFETY OF THE INFORMANT, THE TOTALITY OF RESTRICTIONS ON CROSS-EXAMINATION, WHICH COMPLETELY FORECLOSED THE DEFENSE FROM DISCOVERING THE IDENTITY OF THE KEY PROSECUTION WITNESS, WHICH TOTALLY FORECLOSED THE DEFENSE FROM INDEPENDENTLY INVESTIGATING THE CREDIBILITY AND VERACITY OF THAT WITNESS, AND WHICH PREVENTED BOTH THE DEFENDANT AND THE TRIER OF FACT FROM EVEN SEEING THE FACE OF THE KEY PROSECUTION WITNESS, SIMPLY WENT TOO FAR.

III. WHETHER THE PROSECUTION SHOULD BE PERMITTED TO HAVE THE EXCLUSIVE MEANS OF INDEPENDENTLY INVESTIGATING THE CREDIBILITY OF AND VERIFYING THE TRUTHFULNESS OF THE TESTIMONY OF PROSECUTION WITNESSES.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

INDEX OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 15

A. **THE MICHIGAN COURT APPEALS WAS CORRECT IN HOLDING THAT THE RIGHT OF CONFRONTATION SHOULD APPLY AT A MICHIGAN ENTRAPMENT HEARING, WHICH IS NOT FUNCTIONALLY DIFFERENT FROM A BENCH TRIAL LIMITED TO THE DEFENSE OF ENTRAPMENT. MOREOVER, PETITIONER HAS NOT CHALLENGED THE STATE COURT'S ALTERNATIVE BASIS FOR ITS HOLDING, THAT EVEN INF THE SIXTH AMENDMENT DID NOT APPLY TO SUCH HEARING PRINCIPLES OF DUE PROCESS AND FUNDAMENTAL FAIRNESS WOULD DEMAND THE SAME RESULT.** 16

B. **THE MICHIGAN COURT OF APPEALS DID NOT ERR IN HOLDING THAT EVEN IF CONCERNS FOR THE SAFETY OF THE INFORMANT WERE LEGITIMATE, THE COMPLETE FORECLOSURE OF CROSS-EXAMINATION OF THE KEY PROSECUTION WITNESS AS TO HIS NAME, ADDRESS, OR ANY INFORMATION THAT MIGHT LEAD TO HIS IDENTITY SIIMPLY WENT TOO FAR, BECAUSE THE RESTRICTIONS COMPLETELY PRECLUDED RESPONDENT FROM INDEPENDENTLY INVESTIGATING THE INFORMANT'S CREDIBILITY AND VERACITY.** 22

C. **RESPONDENT WAS FURTHER DENIED HIS RIGHT TO CONFRONT THE KEY WITNESS AGAINST HIM, WHEN THE COURT ALLOWED THE WITNESS TO TESTIFY WEARING A SKI MASK TO COVER HIS FACE AND THE OTHER PROCEDURES FAILED TO ENSURE THE RELIABILITY OF THE EVIDENCE.** ... 30

D. **OTHER CONSIDERATIONS FOR DENYING THE WRIT.** 35

RELIEF REQUESTED 39

res*rn5639.ubr*05-27-92
Sammons, Martin

INDEX OF AUTHORITIES

CONSTITUTIONS, COURT RULES, STATUTES

US Const Am VI 15

US Const Am XIV 15

CASES

Alford v United States, 282 US 687; 51 SCt 218; 75 LEd 624 (1931) 9, 23, 27, 28

Coy v Iowa, 487 US 1012; 108 SCt 2798; 101 LEd2d 857 (1988) 11, 31, 32, 33

Delaware v Van Arsdall, 475 US 673; 106 SCt 1431; 89 LEd2d 674 (1986) 29

Dennis v United States, 384 US 855; 86 SCt 1840; 16 LEd2d 973 (1966) 12, 25

Giglio v United States, 405 US 150; 92 SCt 763; 31 LEd2d 104 (1972) 13, 25

Kentucky v Stincer, 482 US 730; 107 SCt 2658; 96 LEd2d 631 (1987) 17, 18

Lee v Illinois, 476 US 530; 106 SCt 2056; 90 LEd2d 514 (1986) 10, 24

Maryland v Craig, ___ US ___; 110 SCt 3157; 111 LEd2d 666 (1990) 11, 31, 32, 34

McCray v Illinois, 386 US 300; 87 SCt 1056; 18 LEd2d 62 (1967) 19

Napue v Illinois, 360 US 264; 79 SCt 1173; 3 LEd2d 1217 (1959) 13, 25

People v D'Angelo, 401 Mich 167; 257 NW2d 655 (1977) . . 1, 16

People v Dye, 431 Mich 58; 427 NW2d 501 (1988) 32

People v Hendrick, 398 Mich 410; 247 NW2d 840 (1976) . . 29

People v Juillet, 439 Mich 34; 475 NW2d 786 (1991) . . . 1

People v Sammons, 191 Mich App 351; 478 NW2d 901 (1991) 6, 7, 12, 21, 34

People v Turner, 390 Mich 7; 210 NW2d 336 (1973) 1

Roviaro v United States, 353 US 53; 77 SCt 623; 1 LEd2d 639 (1957) 18, 19

Smith v Illinois, 390 US 129; 88 SCt 748; 19 LEd2d 956 (1968) 9, 22, 23, 27, 28

United States v Alston, 460 F2d 48 (5th Cir, 1972) . . . 10, 27, 28

United States v Gomez-Rojas, 507 F2d 1213 (5th Cir, 1975) 19

United States v Walker, 772 F2d 1172 (5th Cir, 1985) . . 32

COUNTERSTATEMENT OF THE CASE

Respondent Martin Sammons was convicted of possession with intent to deliver between 225 and 650 grams of a mixture containing cocaine, and conspiracy to deliver the same 225 to 650 grams of a mixture containing cocaine, after a jury trial held June 28 and 29, 1988, in Bay County (Michigan) Circuit Court, the Honorable William J. Caprathe presiding. On September 6, 1988, Mr. Sammons was sentenced to 20 to 30 years in prison for possession with intent to deliver cocaine, plus a mandatorily consecutive 20 to 30 year sentence for conspiracy to deliver the same cocaine.

Respondent raised the defense of entrapment, and an extensive pretrial entrapment hearing was held before the trial court from May 4 through June 7, 1988.[1] The entrapment hearing was held jointly with the entrapment hearings for codefendants Alan Stone and James Wallace.

Mr. Sammons testified in support of his defense of entrapment. The key prosecution witness against Respondent's claim of entrapment, known only as "Confidential Informant Rick", testified at the entrapment hearing and despite repeated defense requests for disclosure of his identity, was allowed to testify without having to disclose to the defense or the court his real name, address,

---

[1] Michigan is among the minority of states which follows the so-called "objective" test of entrapment. People v Turner, 390 Mich 7; 210 NW2d 336 (1973); People v Juillet, 439 Mich 34; 475 NW2d 786 (1991). In Michigan, the defense of entrapment is not presented to the jury at trial but is decided by the trial judge at a separate entrapment hearing, usually, although not necessarily, before trial. People v D'Angelo, 401 Mich 167; 257 NW2d 655 (1977).

where he worked, or any other "identifying information". Moreover, despite defense objection, he was allowed to testify at the entrapment hearing wearing a ski mask to hide his face and any facial expressions. Any questions that might directly or indirectly lead to the defense discovering his name or any other "identifying information" were barred. The Court denied repeated defense motions to reveal the face and identity of the masked witness. It repeatedly sustained the prosecution's objections to areas of questioning not even related to identity, whenever the prosecution would claim an answer to a particular question might help the defense indirectly discover the identity of this masked witness.

Mr. Sammons claimed that "Rick" entrapped him by persistently calling him and his family day and night for weeks, at least 50 to 70 times, with appeals to sympathy that "Rick's" life might be in danger from others if he did not find some drugs, with appeals to Mr. Sammons' cocaine addiction that he would be given cocaine if he helped "Rick", and finally ending in threats to Mr. Sammons' own safety if he did not help "Rick" come up with some drugs.[2]

All three codefendants had previously seen "Rick". However, Mr. Sammons testified he did not know "Rick's" real name or where he lived, but only knew his first name from having used drugs with him on a few occasions in the Detroit area. Moreover, he did not

---

[2] The Michigan Court of Appeals below held that absent "Confidential Informant Rick's" testimony, Mr. Sammons had carried his burden of establishing entrapment under Michigan law by a preponderance of the evidence.

know with the ski mask on if the witness was the same person he knew as "Rick".

Despite numerous defense objections, the true identity of "Confidential Informant Rick" was never revealed to the defense (or to the court), either before the hearing or in court. "Rick" was called by the prosecution at the hearing and allowed to testify over objection wearing a ski mask to cover his face and hide his identity. "Rick" was not viewed face-to-face by the Court or the defendants while he was testifying. His real name was never revealed to the defense or even to the court. Moreover, defense requests or cross-examination seeking more complete information about the secret witness (short of identifying him) were repeatedly rebuffed, controlled, or limited by the efforts of the prosecution.

The prosecution first claimed that "Rick's" identity need not be disclosed because he was a confidential informant and this was an entrapment hearing and not a trial. The prosecution's other justification for not revealing "Rick's" real name or face were alleged threats to "Rick's" safety, allegedly made by codefendants Wallace and Stone. The prosecution attempted to establish these alleged threats to "Rick" through a second confidential informant, who was also allowed to testify wearing a ski mask and without revealing his name. The Court would also not allow questions of this witness regarding a possible motive he had to make up these threats in an effort to protect his friend "Rick's" identity. Mr. Stone and Mr. Wallace denied ever making any threats.

The police set up a phone call to try to confirm the alleged threats, which they tape recorded. They ended up taping only one

side of the telephone conversation, which revealed no threats. There was no evidence any alleged threats were ever followed up on, despite codefendants Stone and Wallace being out on bond during that period. Moreover, the alleged threats, if believed, appeared directed not really toward "Rick" as much as toward police officer John Buczek, who testified at the hearing without a mask.[3]

Whether or not the threats existed, there was no evidence that Respondent Martin Sammons was involved in or knew of any of the alleged threats.

The Court ruled that a "preponderance of the evidence" favored nondisclosure of "Confidential Informant Rick's" identity. The Court therefore allowed him to keep his ski mask on during his testimony, and prevented Respondent from asking any question which might lead to his name, address, identity, or anything that might directly or indirectly lead to his identity -- even specific dates of the search of his house, his prior offenses, or his date of his most recent conviction and scheduled sentencing.

In a pretrial motion for discovery, counsel asked for discovery of any information in possession of the prosecution or police agencies, which might lead to impeachment of any government witness, or any information which might suggest or support a defense. In addition, the defense asked for information regarding the confidential informant including: Full name, any aliases used,

---

[3] Although this witness testified that the alleged threats to "Rick's" safety surfaced in March of 1988, in December of 1987 the prosecutor at the preliminary examination refused to disclose the name of the informant, citing threats to the informant's safety before any evidence of threats apparently existed.

address, phone number, criminal history, employment history, pending charges, criminal investigations involving him, any offers or suggestions of leniency, any plea agreements or negotiations, benefits offered or given to them from police agencies or prosecutors, and information on any aid given by him to police or prosecutors. Defense counsel stated that the requested information was necessary for proper investigation and preparation of a defense of this matter. [Respondent Stone's Motion for Discovery and Inspection, filed 3/25/88].

The Bay County Prosecutor filed a response but failed to address the question of whether it knew of any evidence that the defendant could possibly used as a matter of defense, such as entrapment. With regard the confidential informant, the prosecution stated it would not voluntarily release his name, aliases, address, phone number, employment history, pending charges, or plea agreements or negotiations that were not related to the informant's role in the investigation of defendants Sammons, Stone and Wallace.

While the prosecution disclosed what it claimed to be the informant's prior conviction record, the prosecution refused to disclose the nature of any other pending charges against the witness. The prosecution stated that other information the defense requested was "irrelevant" or "unrelated", and refused to disclose it. Neither the defense nor the court had any way of verifying whether that information was "irrelevant" or "unrelated", because the prosecution never disclosed what that information was and never

disclosed the informant's name to allow anyone else to independently investigate its claim.

At the entrapment hearing, for almost four days, "Rick" and police officers falsely denied that any promises were made in exchange for his cooperation. Only at the very end of the hearing was it revealed that the police had told "Rick" that although nobody got out of charges completely, the more the person did and the better job they did, the more the police would talk to the prosecutor on that person's behalf, and that the prosecutor would make the final decision as to what charges would be brought.

At the conclusion of the hearings, the trial judge denied Respondent's Motion to Dismiss on the ground of entrapment, in essence making credibility determinations in favor of the masked unidentified witness.

Respondent appealed his convictions and sentences as of right to the Michigan Court of Appeals. The Court of Appeals reversed and remanded for a new entrapment hearing, holding that Respondent was denied his right to confront the key witness against him when the prosecution's key witness at the entrapment hearing was allowed to testify while wearing a ski mask and without disclosing his name, address, where he worked, or any other information that might directly or indirectly lead to the defense discovering his identity. People v Sammons, 191 Mich App 351; 478 NW2d 901 (1991). In addition, the Court stated that it would be fundamentally unfair and contrary to principles of due process to allow the state to present evidence designed to defeat a defendant's claim of

entrapment and at the same time restrict the defendant's ability to effectively examine the reliability of such evidence. Id., at 362.

The Court of Appeals recognized that a trial court has discretion to place some limits on cross-examination where questions "are merely intended to harass, annoy, or humiliate the witness, or where inquiries would tend to endanger the personal safety of the witness." Id., 191 Mich App at 367. However, the Court noted that the extent of such restrictions is not unlimited, and that a defendant may be prejudiced when the restrictions deny the defendant the ability to "place the witness in his proper setting". Id., 191 Mich App at 367.

The Court of Appeals recognized that a trial judge may be justified in limiting cross-examination into certain areas in light of threats, where there is both sufficient reason for nondisclosure and the defendant is possessed of other sufficient information with which to place the witness "in his proper setting." However, the Court found that what occurred in the present case was not merely a reasonable limitation on identifying information but a "total foreclosure" of identifying information, which constituted a "preclu[sion of] all such cross-examination altogether". People v Sammons, supra, 191 Mich App at 366-367. Moreover, the court noted that the trial court failed to make any findings whether Respondent possessed sufficient information in which to "place the witness in his proper setting". The Court of Appeals that absent such findings, the trial court's total foreclosure of identifying information "effectively emasculated" Respondent's right of cross-examination. People v Sammons, supra, 191 Mich App at 367-368.

Furthermore, the Court of Appeals held that the masking of the key prosecution witness further denied Respondent his right of confrontation, because the masking of the witness interfered with the trier of fact properly assessing the demeanor of the witness, because face to face confrontation was denied and the rest of the procedures employed failed to ensure the reliability of the testimony.

The Court of Appeals found that absent Confidential Informant Rick's testimony, Mr. Sammons had carried his burden of establishing entrapment under Michigan law by a preponderance of the evidence. The Court of Appeals remanded the case for a new entrapment hearing consistent with the opinion, still leaving the trial court with the power to place necessary limitations on cross-examination, short of total foreclosure of all identifying information, at the hearing.

The Michigan Supreme Court denied Petitioner's Application for Leave to Appeal that decision, with three of the seven Justices writing that they would have granted leave to appeal.

Respondent respectfully asks this Court to deny the Petition for Certiorari filed by the Bay County Prosecutor in this matter, for the reasons stated below.

SUMMARY OF ARGUMENT

The Michigan Court of Appeals did not err in holding that the same interests the Confrontation Clause protects, to ensure the reliability of evidence, should also apply at a Michigan entrapment hearing, which is not functionally different from a bench trial where the issue of entrapment is raised. Moreover, the Court held that whether or not the Confrontation Clause applies, principles of due process and fundamental fairness would demand the same result.

This Court has held for the past 60 years that the starting point in being able to confront an adverse witness is to know who that witness is and where he comes from. As this Court stated in Smith v Illinois, 390 US 129, 131; 88 SCt 748; 19 LEd2d 956, 959 (1968):

> "...when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself."

Smith was based on this Court's decision in Alford v United States, 282 US 687, 691-693; 51 SCt 218; 75 LEd 624, 627-628 (1931), which recognized that cross-examination of a witness is a matter of right, and that among its core purposes is so that **independent** testimony may be sought and offered concerning the witness's reputation for veracity in his own community.

No decision of this Court or any other court has ever permitted a trial court to allow a crucial witness called by the

prosecution against the accused to testify without revealing his or her name and face. This Court recognized in Lee v Illinois, 476 US 530, 540; 106 SCt 2056; 90 LEd2d 514, 525 (1986), that a basic purpose of confrontation is to promote the perception of fairness in an "open and even" contest between the accused and accuser, and ensures that "convictions will not be based on the charges of unseen and unknown -- and hence unchallengeable -- individuals."

Exceptions to the Smith/Alford rule may allow a witness in certain circumstances to keep secret his or her home address or place of business, but have never been interpreted to allow a key prosecution witness to testify without revealing his name and face. United States v Alston, 460 F2d 48, 53 (5th Cir, 1972).

This is not a case where the trial court placed reasonable restrictions on the right of confrontation in light of concerns for the witness's safety, such as a restriction on revealing the witness's home address. Rather, the trial court completely precluded the defense from independently investigating the credibility and veracity of the key prosecution witness against Respondent, and completely denied the defense any means to independently verify that anything stated by this witness was true. In fact, because the trial court allowed the witness to remain masked while testifying, the defense was denied the ability to determine if the person who testified was even the person he claimed to be. Nowhere has an appellate court approved such a package of total restrictions that has prevented a person accused of a crime from learning the name of and seeing the face of the key witness called by the prosecution to testify against him or her.

In addition to the restrictions on meaningful cross-examination, the masking of the witness denied Defendant the right to face-to-face confrontation of the witness against him. Coy v Iowa, 487 US 1012; 108 SCt 2798; 101 LEd2d 857 (1988); Maryland v Craig, ___ US ___; 110 SCt 3157; 111 LEd2d 666, 681 (1990). The masking prevented not only the defendant but the trier of fact from viewing the face of the witness in order to assess his facial expressions and demeanor while testifying. Moreover, the masking of the witness not only interfered with the judge's perception of the witness's demeanor, but may also have distorted the rest of the demeanor the witness exhibited. Cf. Coy, supra, 101 LEd2d at 866. A person who knows that no one will be able to find out his identity or see his face, who knows that the opposing party will be not be able to question him question him about the most revealing details of his life or past actions, may feel free to lie and as a result may exhibit one type of demeanor and "body language" when testifying behind a cloak of secrecy. But that person may display a markedly different demeanor when he has to testify with the judge and the person he is accusing looking at him face-to-face, knowing he is subject to full cross-examination about the hidden details of his life, and to possible discovery if he lies.

The Michigan Court of Appeals carefully balanced the competing concerns in this case, and found under the circumstances that the total preclusion of any inquiry into anything remotely related to the key prosecution witness's identity, coupled with the masking of the witness, simply went too far. The Court of Appeals found that the trial judge may have been justified in limiting cross-

examination into certain areas, but that total preclusion went too far, and the masking of the witness interfered with the trier of fact's ability to adequately assess the witness's demeanor.

The Court of Appeals was correct in its conclusion that the total cloak of secrecy placed over the key witness against Respondent at this entrapment hearing denied him the ability to meaningfully confront that witness. As the Court of Appeals noted, what occurred in this case was not merely a reasonable limitation on cross-examination on noncrucial identifying information, but was a "total foreclosure" of identifying information, which "precluded all such cross-examination altogether", and "'effectively emasculated' defendant's right of cross-examination". People v Sammons, 191 Mich App at 366-367.

This Court recognized in Dennis v United States, 384 US 855, 873; 86 SCt 1840; 16 LEd2d 973, 985 (1966), that "it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact." Yet the totality of the restrictions in the present case placed the prosecution in absolute control of the access to all relevant information, so that the defense was completely unable to independently investigate or verify any claims made by the witness or the prosecution.

The masking of the witness's identity prevented Respondent from exploring many significant areas for potential cross-examination. The restrictions on identifying information prevented the defense from discovering whether the witness had a more extensive prior criminal conviction record than the prosecution disclosed. The restrictions prevented the defense from discovering

whether there were undisclosed pending charges that were dismissed as a result of the witness's cooperation with police or the prosecution, or for which the witness reasonably expected he might receive leniency in exchange for his cooperation or testimony. The restrictions prevented the defense from independently investigating the informant in his community to see if he had a reputation as someone who might perjure himself to get himself out of trouble, or who would go to whatever reprehensible means were necessary to extricate himself from his problems. The prosecution in this case only disclosed what it believed was relevant to the charges against Respondent in this case, but there may have been a great wealth of other information that the prosecution did not disclose which the defense may have been able to use in cross-examining the witness or in attacking the witness's credibility. Moreover, the restrictions prevented the defense from discovering if the prosecution was truthful and complete in disclosing the limited information it did give. See e.g. Napue v Illinois, 360 US 264; 79 SCt 1173; 3 LEd2d 1217 (1959); Giglio v United States, 405 US 150; 92 SCt 763; 31 LEd2d 104 (1972).

Our founding fathers established a right of confrontation in the Bill of Rights to protect us from these very abuses -- the government using secret, unchallengeable witnesses against an accused person. If the right of confrontation is to have any meaning, it should require a key witness called by the government against the accused to reveal his name and testify without a mask.

The record, as it stands now, is inadequate for this Court to determine if something significant in this informant's past was

hidden from the defense and the trial court at the initial hearing. This Court should deny review so that the trial court will have the opportunity to make that determination.

REASONS FOR DENYING THE WRIT

In the present case, the key prosecution witness against Respondent's claim of entrapment was allowed to testify without ever revealing his face, his name, his address, or any other significant identifying information. He wore a ski mask to cover his face. He refused to give his name. He refused to disclose either his current place of residence or his residence at the time of his involvement as an informant. He refused to uncover his face so that the defense could see if he was the same person who instigated the drug deal in question or was an impostor.

If the constitutional right of confrontation, US Const Am VI, XIV; has any meaning, it requires that a witness called by the prosecution cannot testify behind a cloak of almost total secrecy. It requires that the prosecution not control the sources of information that may be used to challenge the credibility of their own witnesses. It requires that at a bare minimum the witness give his or her name. It should also require that the witness confront the defendant face to face, so the defendant can look at the witness against him, and so the trier of fact can assess the witness's demeanor during his testimony.

Just one of these restrictions would be a significant constitutional violation. In this case, however, not just one but all of these aspects of confrontation were curtailed. The cumulative effect of these restrictions, the total cloak of secrecy that the Court allowed to be placed over this witness, denied

Respondent his constitutional right to meaningfully confront the key witness against him in this case.

A. **THE MICHIGAN COURT APPEALS WAS CORRECT IN HOLDING THAT THE RIGHT OF CONFRONTATION SHOULD APPLY AT A MICHIGAN ENTRAPMENT HEARING, WHICH IS NOT FUNCTIONALLY DIFFERENT FROM A BENCH TRIAL LIMITED TO THE DEFENSE OF ENTRAPMENT. MOREOVER, PETITIONER HAS NOT CHALLENGED THE STATE COURT'S ALTERNATIVE BASIS FOR ITS HOLDING, THAT EVEN IF THE SIXTH AMENDMENT DID NOT APPLY TO SUCH HEARINGS, PRINCIPLES OF DUE PROCESS AND FUNDAMENTAL FAIRNESS WOULD DEMAND THE SAME RESULT.**

Petitioner first takes the position that the right of confrontation is only a trial right, and that because under Michigan law the defense of entrapment must be raised at a separate evidentiary hearing before the trial court, the right of confrontation does not apply.[4]

The only reason the prosecution is raising the question of whether the right of confrontation applies during a hearing to determine an entrapment claim is because Michigan, unlike the majority of jurisdictions, has adopted the so-called "objective" test of entrapment, which is decided by the trial court at a separate hearing and not by the jury at trial. People v D'Angelo, 401 Mich 167, 176-177; 257 NW2d 655 (1977).

---

[4] Petitioner presents the question as whether the Sixth Amendment Confrontation Clause applies to pretrial hearings. It should be noted that Michigan law does not require an entrapment hearing to be held before trial, although in most cases it is.

In a majority of jurisdictions, including the federal system, the defense of entrapment is an issue litigated at trial as a matter of defense. There, the defendant must prove that the government engaged in reprehensible behavior that instigated the crime, and that the defendant was not predisposed to commit the crime. Since the entrapment claim is litigated before the trier of fact at trial in such cases, the right of confrontation clearly applies -- whether the entrapment claim is decided by a jury or by a judge at a bench trial. Michigan's entrapment hearing is most similar to a bench trial on the issue of entrapment. The same reasons why the right of confrontation applies at a bench trial in United States District Court where entrapment is raised as a defense, apply to Michigan's entrapment hearing as well -- to ensure the reliability of the findings of fact and to ensure that there is rigorous adversarial testing of the credibility of witnesses. There is no significant functional difference so that the right of confrontation should apply to one procedure but not the other.[5] These same concerns apply whether the hearing is labeled a "hearing" or a "bench trial".

In this case, the Michigan Court of Appeals carefully examined this Court's opinion in Kentucky v Stincer, 482 US 730; 107 SCt 2658; 96 LEd2d 631 (1987). The Court noted that while a Michigan entrapment hearing "may not be a criminal prosecution involving the assessment of guilt or innocence, it remains, like a criminal

---

[5] The Sixth Amendment does not specifically limit the right of confrontation to "trials". It states that it applies "[i]n all criminal prosecutions".

trial, adversarial in nature and requires the resolution of factual issues by a trier of fact." The Court concluded that the interests involved in ensuring the reliability of evidence at trial also apply to an entrapment hearing. The Court noted that to the defendant a fair resolution of an entrapment claim is normally more critical than the trial itself, because that person has essentially conceded commission of the offense. Moreover, unlike the situation in Stincer, a defendant in Michigan may not renew entrapment at trial. The Court of Appeals held that to deny the defendant the right of confrontation at a Michigan entrapment hearing would be to deny him "the opportunity to ensure that the evidence presented against him, which may defeat his claim of entrapment and remove any impediment to a subsequent trial and conviction, 'is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings.'"

In this regard, it may be helpful to examine the way this Court has treated the so-called "informant's privilege", which allows a person who supplies the government with a tip to prevent disclosure of his or her identity.

In Roviaro v United States, 353 US 53; 77 SCt 623; 1 LEd2d 639 (1957), this Court held that the applicability of that privilege depends on the particular circumstances of each case, and the underlying purpose of the privilege, but:

> "Where the disclosure of an informer's identity, or of the contents of his communication, **is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause**, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the

information, dismiss the action." [Emphasis added]. Roviaro, 353 US at 60-61.

This Court held that a balance must be struck, depending on:

"...the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." Roviaro, 353 US at 62.

In McCray v Illinois, 386 US 300; 87 SCt 1056; 18 LEd2d 62 (1967), this Court held that the state was not required, at a preliminary hearing to determine whether the police had probable cause to arrest or search, to disclose the identity of the tipster who provided them with the tip. Contrasting Roviaro, the Court in McCray noted that in Roviaro, the informant had taken a "material part in bringing about the possession of certain drugs by the accused, [and] had been present with the accused at the occurrence of the alleged crime", McCray, supra, 386 US at 309-310.

Significantly, both Roviaro and McCray point out that when the informant's knowledge is relevant to the question of **entrapment**, the balance favors disclosure of the witness's identity. Roviaro, supra, 353 US at 64; McCray, supra, 386 US at 310. See also United States v Gomez-Rojas, 507 F2d 1213, 1219 (5th Cir, 1975).

An entrapment hearing is not like a hearing to determine whether the police had probable cause to search or arrest a witness. In such suppression hearings, the informant generally need not be disclosed because a determination of whether the police had probable cause deals with what the police knew at the time, which may be based on hearsay. The police can be cross-examined on why they believed their underlying information was reliable and why

the informant was credible. Even in those circumstances, disclosure is sometimes required.

Here, however, the very credibility of this participant was the key issue at the entrapment hearing. Respondent claimed the informant entrapped him with persistent phone calls day and night for weeks, concerns for the safety of the informant and later himself, and by taking advantage of Respondent's se ere cocaine addiction with offers of drugs. "Rick's" version of the telephone conversations was completely different than Respondent's. The court had to make a credibility determination whether to believe the unknown government informant or Respondent. Given the nature of the defense, the extensive involvement of the informant, and the importance of his testimony, all factors supported the disclosure of this witness's identity and meaningful confrontation with him.

The government cannot "have it both ways". While the government may have a privilege in some circumstances to withhold from the defense the identity of a confidential informant they do not plan to call, once they actually choose to use that informant as a witness, they have no right to withhold the identity of that witness. The right of confrontation was designed so that the state would not be able to hide the identity of those intimately and extensively involved in instigating and inducing criminal activity on the government's behalf. It was designed to prevent the prosecution from calling secret witnesses on their behalf.

The Michigan Court of Appeals did not err in applying the right of confrontation to the unique situation presented under Michigan law, which, unlike most states, provides for a separate

"bench trial" type proceeding to resolve the claimed defense of entrapment. At a Michigan entrapment hearing, like a federal bench trial concerning an entrapment claim, testimony is taken, credibility determinations are made, the trial court makes findings of fact as the trier of fact, and applies the law to those findings to reach a decision on whether the defense is proven. There is no reasoned distinction why the right of confrontation should apply to one but not the other, simply because one is called a "trial" and the other a "hearing", when the language of the Sixth Amendment makes no such distinction.

Moreover, the Michigan Court of Appeals did not merely rely on the Confrontation Clause to reach its decision. Rather, it also relied on principles of due process and fundamental fairness to reach its conclusion in this case:

> "Finally, we believe that it would be fundamentally unfair and contrary to principles of due process, to allow the state to present evidence designed to defeat a defendant's claim of entrapment and at the same time restrict the defendant's ability to effectively examine the reliability of such evidence." People v Sammons, supra, 191 Mich App at 362.

Petitioner has limited its first question only to whether the Sixth Amendment "Confrontation Clause" applies to pretrial hearings. It has not raised the question before this Court whether due process and principles of fundamental fairness allow the state to present evidence designed to defeat an entrapment claim and at the same time to restrict the defendant's ability to effectively challenge that evidence. Thus, even if this Court were to decide that the right of confrontation does not apply to pretrial

hearings, the prosecution has not challenged the ruling below that principles of due process of law and fundamental fairness would demand the same result.

B. THE MICHIGAN COURT OF APPEALS DID NOT ERR IN HOLDING THAT EVEN IF CONCERNS FOR THE SAFETY OF THE INFORMANT WERE LEGITIMATE, THE COMPLETE FORECLOSURE OF CROSS-EXAMINATION AS TO HIS NAME, ADDRESS, OR ANY INFORMATION THAT MIGHT LEAD TO HIS IDENTITY SIIMPLY WENT TOO FAR, BECAUSE THE RESTRICTIONS COMPLETELY PRECLUDED RESPONDENT FROM INDEPENDENTLY INVESTIGATING THE INFORMANT'S CREDIBILITY AND VERACITY.

The starting point in being able to meaningfully confront an adverse witness is to know who that witness is and where he comes from. In Smith v Illinois, 390 US 129; 88 SCt 748; 19 LEd2d 956 (1968), the principal prosecution witness testified he had purchased heroin from the defendant in a restaurant. Part of his testimony was corroborated by police officers, but only this witness and the defendant testified as to the crucial events in question, and their versions were entirely different. On cross-examination, the witness admitted the name he gave was not his real name. When asked what his correct name was and where he lived, the Court sustained the prosecution's objections. Although the defendant and his lawyer knew the witness, there was no evidence that either the defendant or his attorney knew his correct name or where he was living at the time of trial.[6]

---

[6] This factual scenario is remarkably similar to the instant case, where Respondent had met "Rick" before, but did not know his real name or where he lived.

On appeal, this Court reversed the defendant's conviction, finding a fundamental violation of his right of confrontation:

> "...when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." Smith v Illinois, 390 US 129, 131; 88 SCt 748; 19 LEd2d 956, 959 (1968).

Smith followed the opinion of this Court in Alford v United States, 282 US 687; 51 SCt 218; 75 LEd 624 (1931). In Alford, the trial judge sustained objections to questions by the defense seeking to elicit the "place of business" of a prosecution witness, a former employee of the accused. This Court unanimously reversed the conviction, finding a denial of the right of confrontation. This Court stressed that one essential purpose of requiring a witness to disclose his address or place of business is so that the defendant may independently investigate the witness' reputation for credibility in the community:

> " Cross-examination of a witness is a matter of right. Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood...
>
> * * *
>
> "The question 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face, without any such declaration of purpose as was made by counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed." [Citations omitted]. Alford v United States, 282 US 687, 691-693; 51 SCt 218; 75 LEd 624, 627-628 (1931).

In Lee v Illinois, 476 US 530, 540; 106 SCt 2056; 90 LEd2d 514, 525 (1986), this Court explained that a core purpose of confrontation is to promote the perception of fairness in an "open and even" contest between the accused and accuser:

> "The Confrontation Clause advances these goals by ensuring that convictions will not be based on the charges of unseen and unknown -- and hence unchallengeable -- individuals."

Here, counsel for the accused had absolutely no way of launching an independent investigation into the secret witness's credibility and reputation for veracity, as he was precluded from asking who this person was, where he was from, who his associates were in the past or present, or even what he looked like. This witness truly was unchallengeable.

The prosecution did disclose what they claimed was the witness's prior criminal conviction record. However, the prosecution refused to disclose a great deal of other information requested by the defense. They refused to disclose the nature of all charges that had been pending against the witness when he began to work for the police, stating the other charges were irrelevant to this charge. They refused to disclose any other forms of leniency the witness may have received from the prosecution in other cases. They refused to give the defense the basic information so that the defense could investigate the witness through a search of court records or police records, or questioning of associates. The prosecution completely controlled what was "relevant" and what was not "relevant" in this case.

Moreover, the defense had no way of verifying whether the very limited information the prosecution supplied was accurate or complete. See Napue v Illinois, 360 US 264; 79 SCt 1173; 3 LEd2d 1217 (1959); Giglio v United States, 405 US 150; 92 SCt 763; 31 LEd2d 104 (1972).

The total cloak of secrecy as to this witness's name, face, address, employment, associates, and the court's restrictions on anything that could even indirectly point to his identity, placed the defense at the mercy of the prosecution to provide it with the information it needed to attack the credibility of the prosecution's key witness. Yet this Court has stated:

> "In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact." Dennis v United States, 384 US 855, 873; 86 SCt 1840; 16 LEd2d 973, 985 (1966).

The cloak of secrecy placed over "Secret Witness Rick's" identity prevented Respondent from effectively and independently investigating "Rick's" background and credibility. Counsel specifically asked for disclosure of the witness's name so that he could independently investigate the witness's reputation for veracity, but the Court refused. As a result, Respondent was clearly denied of the essence of confrontation -- he was denied any meaningful opportunity to investigate and challenge the credibility of the key witness against him.

The justification given for the drastic measures taken to place a cloak of secrecy around "Confidential Informant Rick" were the prosecution's concerns for his safety, based on alleged threats

to kill or seriously harm "Rick". The evidence the prosecution claimed established a serious threat to "Rick's" safety was based entirely on the testimony of a second masked unnamed witness the prosecution called. The prosecution testimony was replete with contradictions as to who even made the threat, statements that it wasn't really "Rick" they wanted, and a tape recorded phone call designed to confirm the alleged threat that disclosed no threat.[7] The persons this masked witness claimed made the threats testified and denied ever making them. They claimed the "threats" were a complete fabrication.

But even if threats were made, there was no evidence that Respondent Martin Sammons had any involvement whatsoever in the alleged threats. The threats, if made at all, were communicated by codefendants James Wallace and Alan Stone, while Mr. Sammons was at all times in jail. Mr. Sammons had no involvement in the threats and no means to carry them out. Yet Mr. Sammons, an innocent party with regard to the threats, had his right and ability to meaningfully confront the key witness against him completely cut off because the court found by a mere "preponderance of the evidence" that someone else might have uttered some threats.

More importantly, even if the concerns for the safety of "Rick" were legitimate, the radical measures taken in the name of protecting his safety went way beyond what was necessary or

---

[7] The circumstances lead one to believe that the "threats" could have been conveniently concocted so that "Rick's" identity need not be disclosed. The defense was prevented from questioning the witness as to whether he was the one who turned his friend "Rick" in to police, which would have given him a possible motive to help "Rick" out of the predicament "Rick" faced in having to testify.

legitimate to the point of interfering with meaningful confrontation and the reliability of the factfinding process. No case has gone so far to allow such complete restrictions on the disclosure of the name, face, address, or any other identifying information of a key prosecution witness.

While there have been exceptions applied to the rules set down in Smith and Alford, those exceptions have been limited to allowing the witness to refuse to disclose his **address or place of business** in appropriate circumstances. But those exceptions have never been interpreted to allow a key witness to refuse to disclose his **name**. They have certainly not allowed a key prosecution witness to refuse to disclose his name and then hide behind a ski mask in court. These exceptions have never condoned a total cloak of secrecy like the one placed over this witness.

The leading case on the extent of these exceptions is United States v Alston, 460 F2d 48 (5th Cir, 1972). In Alston, a police undercover narcotics agent, whose testimony was critical to the government's case against the defendant, refused to divulge his home address on cross-examination. The Court in Alston, at 51-52, distinguished this Court's opinion in Smith v Illinois, noting that in Smith the witness's failure to disclose both name and address resulted in the defendant not being given sufficient opportunity to place the witness in his proper setting:

> "In Smith, a narcotics case, a Government informer who was allegedly a narcotics addict himself refused to divulge not only his home address but also his real name. Faced with a witness who testified only under an alias and who did not have an existing occupation at the time of the trial, the defense was left with nothing on which to base an effective cross-examination for purposes of

contradiction or impeachment of the Government's primary witness."

In contrast, in Alston, the failure to divulge the witness's present home address on safety grounds did not prevent the defense from the opportunity to engage in a comprehensive exploration of the witness's background. That witness was required to disclose his real name, his address at the time of the offense, his military and past work history, his work history as an undercover agent and the aliases he had used, the name of his work supervisor, and the telephone number he had used in his dealings with the defendant. This disclosure thoroughly "placed" that witness, so that disclosure of his home address would add virtually nothing relevant to what was already known about him.[8]

Distinguishing Smith and Alford, the Court in Alston stated:

> "In Alford and Smith there was a possibility of a **Man in the Iron Mask masquerade**. But Agent Johnson was only permitted to mask his address, a fact difficult to maximize as so important to the defense as to mandate reversal." Alston, supra, at 53.

If any case presented "the Man in the Iron Mask," the instant case did. No one saw the key prosecution witness's face. No one knew his name. No one knew where he lived or where he worked, either in the present or the past. No one, in fact, could tell if the man in the mask sitting on the witness stand was the person who participated in the drug deal.

---

[8] Significantly, the Court in Alston noted that there is a greater need to probe into the credibility of informers, who have no official obligation to provide information and may have a far greater motive to fabricate than perhaps any other witness.

In Delaware v Van Arsdall, 475 US 673, 679; 106 SCt 1431; 89 LEd2d 674 (1986), this Court found a denial of the right of confrontation because the restrictions on cross-examination by the trial court effectively foreclosed all inquiry into a relevant event that might reasonably have furnished the defense with grounds for impeachment of a key witness. In the present case, the restrictions on the most basic of inquiries -- the witness's name -- had a similar effect, but foreclosed not merely one but countless areas of impeachment.

Petitioner misleads this Court when it states that the only aspect of confrontation that was denied was the witness's name and face. Had the defense been allowed to ask "Rick" his real name, they may have uncovered other prior convictions or pending charges the prosecution did not disclose to them.[9] They may have been able to discover persons in the community who could state "Rick" had a reputation as a pathological liar who would say anything to get himself out of the predicament he was in, or who was so scared of going to jail he would use any reprehensible tactic he could to make sure a drug deal went down. They may have discovered a perjury charge lurking in Rick's past. They may have uncovered a far greater array of pending charges that "Rick" received leniency for in exchange for his cooperation and testimony. These areas

---

[9] As the Michigan Supreme Court has recognized, "rap sheets", LEIN printouts, or even presentence reports are not always accurate in listing a person's criminal record. People v Hendrick, 398 Mich 410; 247 NW2d 840 (1976). Given the circumstances in the present case, where "Rick" falsely testified through 4 days of hearings that no inducements whatsoever had been given for his testimony, the circumstances demanded that the defense have the ability to independently investigate the full extent of his background.

were completely closed off to the defense. The prosecution controlled the only avenues Respondent could use to impeach their witness. The prosecution prevented the defense from acquiring any means to tell if the witness was telling the truth.

The totality of the restrictions placed on Respondent's ability to confront the key witness against him simply went too far. Those restrictions completely precluded the defense from independently investigating the background of the informant. Those restrictions completely precluded the defense from being able to determine if the witness was lying in material aspects of his testimony. The prosecution cannot be allowed to present evidence designed to defeat a claim of entrapment and at the same time restrict the defense's ability to effectively examine the reliability of that evidence. The Michigan Court of Appeals did not err in its conclusion that in the present case, the totality of restrictions simply went too far.

C. RESPONDENT WAS FURTHER DENIED HIS RIGHT TO CONFRONT THE KEY WITNESS AGAINST HIM, WHEN THE COURT ALLOWED THE WITNESS TO TESTIFY WEARING A SKI MASK TO COVER HIS FACE AND THE OTHER PROCEDURES FAILED TO ENSURE THE RELIABILITY OF THE EVIDENCE.

Not only was the defense prevented from knowing the identity of the key prosecution witness, but the witness was allowed to testify with his face concealed at all times inside a ski mask. The defense attorneys argued that this was a violation of the right to confront the witness, when the credibility of that witness was material to the case. The prosecutor argued that the mask did not

interfere with the right of confrontation, stating confrontation simply requires the opportunity to ask questions of a witness and hear their answers. This assertion was patently incorrect.

This Court had occasion to consider the meaning of "confrontation" in Coy v Iowa, 487 US 1012; 108 SCt 2798; 101 LEd2d 857 (1988). This Court held that a screen erected to prevent a child witness from viewing the defendant she had accused of sexual assault, which also partially prevented the accused from seeing her when the witness testified, was a denial of the right of confrontation. The Court held that the Constitution normally requires face to face confrontation, and the use of a screen to prevent such face to face confrontation required reversal of the defendant's conviction:

> "...[The Confrontation Clause] confers at least 'a right to meet face to face all those who appear and give evidence at trial.'"
>
> * * *
>
> " We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." Coy v Iowa, 101 LEd2d at 864.

This Court in Coy traced the roots of the right of face to face confrontation back to the very beginnings of Western legal culture. This Court deemed face to face confrontation important, because "it is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'" Id, at 866.

In Maryland v Craig, ___ US ___; 110 SCt 3157; 111 LEd2d 666, 681 (1990), this Court reaffirmed the importance of face to face confrontation, but held that although there is a strong preference for face to face confrontation, it is not always an indispensable

element of the right to confront one's accusers. However, this Court held that if face to face confrontation is denied, any procedure used must ensure the reliability of the evidence by subjecting it to rigorous adversarial testing and must serve to preserve the essence of effective confrontation. Maryland v Craig, supra, 111 LEd2d at 686; People v Sammons, supra, 191 Mich at 363.

In the present case, the procedures employed failed miserably in ensuring the reliability of "Rick's" testimony.

In the present case, although "Confidential Informant Rick" could apparently see Defendant's face through the eyeholes of his ski mask, Respondent could not see the face of his accuser. The mask made it easier for "Rick" to lie, because he knew no one could see his face or his expressions when he testified. This included the Court, which had to assess his credibility in ruling on the entrapment question. If anything, this was more harmful than the lack of "confrontation" in Coy. At least in that case the trier of fact could see the witness's face to assess her credibility.

> "It has been said that the human face is the index to character and that facial expressions cross all language barriers. The facial expressions of a witness may convey much more to the trier of the facts than do the spoken words." United States v Walker, 772 F2d 1172, 1179 (5th Cir, 1985).

Demeanor evidence is of "utmost importance" in the determination of the credibility of a witness. A witness's facial expressions and demeanor are often more reliable than the literal meaning of the witness's words. People v Dye, 431 Mich 58, 64-65; 427 NW2d 501 (1988).

Moreover, the fact that a witness is allowed to testify without showing his face and without revealing his identity may very well distort the other "body language" or demeanor evidence the witness displays. A person who knows that no one will be able to find out his identity or see his face, who knows that the opposing party will be not able question him about the most revealing details of his life or past actions, who knows he can lie at will with little chance of being caught, may exhibit one type of demeanor and "body language". But if that same person has to show his face, tell everyone who he is, and knows he will be subject to full detailed cross-examination about himself and his past, and that any lies he tells could possibly be discovered, that witness may show a markedly different demeanor. Thus the masking of the witness and his identity not only interfered with the trier of fact's perception of his demeanor, but could very well have distorted the substance of that demeanor itself. Cf. Coy, supra, 101 LEd2d at 866.

Finally, because he was masked, for all we know the person on the witness stand wearing the ski mask may not even have been the same person who Respondent knew as "Rick", but an impostor placed there to assume his role. When asked if he could tell whether the unknown person testifying was the same person as he knew as "Rick", Respondent testified "not with that mask on". Respondent had the right to confront the witness face to face, at least to see if that witness was indeed the same person.

The Michigan Court of Appeals below held that the combined effect of masking the witness and allowing him to testify without

revealing his name, address, place of business, or any other information that could lead to the defense identifying who he really was "'effectively emasculated' defendant's right of cross-examination". People v Sammons, supra, 191 Mich App at 368. The Court of Appeals held it was "fundamentally unfair, and contrary to principles of due process, to allow the state to present evidence designed to defeat a defendant's claim of entrapment, and at the same time restrict the defendant's ability to effectively examine the reliability of such evidence." People v Sammons, supra, 362.

Thus, the Court of Appeals found that the procedures did not ensure the reliability of the evidence and did not preserve the essence of effective confrontation. Maryland v Craig, supra. If anything, these procedures had the exact opposite effect.

It was bad enough that the defense had no meaningful way to independently investigate and attack the credibility of this witness. (See Part B, supra). The Court's ruling that it was unnecessary to see the witness's face to determine his credibility further prevented the witness's reliability from being assessed in any constitutionally meaningful sense.

In its Petition, the Prosecution tries to ignore that it was a complete cloak of secrecy they were allowed to place over their star witness, and instead tries to attack each restriction as if it were an isolated instance. These restrictions cannot be viewed in isolation. It is clear that the total package of restrictions -- the masking of the witness, the refusal to give his name, his address, place of business, or any other identifying information so that the defense could independently investigate his credibility --

foreclosed Respondent from enjoying any meaningful measure of confronting the key witness against him in this criminal prosecution.

The failure to allow Respondent to view the witness against him face-to-face was an egregious violation of the right of confrontation, in light of the other restrictions that prevented Respondent from effectively confronting this masked unknown witness. Our founding fathers enacted the right of face to face confrontation for the very purpose that secret witnesses would not be used against a person accused of a crime. It may be the prosecution's choice in certain circumstances whether or not to call an informant as a witness, but when they decide to do so, the constitution demands that the defendant be able to confront that witness preferably face to face, and minimally, in a constitutionally meaningful manner.

D. OTHER CONSIDERATIONS FOR DENYING THE WRIT.

The Prosecution in its Petition raises a number of "policy arguments" why this Court should allow masked secret witnesses to testify in drug cases. It wants this court to believe that the so-called drug war will be dealt a serious blow if drug dealers, caught by police and given leniency for their cooperation, are forced to state their names and show their faces when testifying as government witnesses.

The Prosecution's claim is, frankly, preposterous. The drug war will not suffer if this Court requires that the right of

meaningful confrontation must apply at entrapment hearings. Every year, close to 10,000 persons are convicted of delivery or possession of controlled substance offenses in the State of Michigan alone. To Respondent's knowledge, this is the only case where the prosecution has felt it necessary to use a secret masked witness in an attempt to defeat a claim of entrapment. In fact, Respondent is aware of no other case in any jurisdiction where a key witness was allowed to testify under the total cloak of secrecy like the one placed over the informant in this case.

The prosecution is essentially urging that the most basic of constitutional rights, the accused's right to meaningfully confront the witnesses against him or her, must be subordinated to law enforcement needs in the "drug war". Yet the decision of the Court of Appeals will not have any measurable effect on law enforcement. Informants up to now have all known that if they become intimately involved in drugs and end up instigating drug deals in order to get themselves out of trouble, there is a strong likelihood that they will have to testify and reveal who they are at trial. A right of total secrecy has never been recognized for such informants, yet this has not stopped a steady flow of informants from going to the police, trying to extricate themselves from their own difficulties by instigating drug deals on the government's behalf. Moreover, the prosecution has many other methods at their disposal to assure that their informants, whose help they have enlisted, are adequately protected if fearful.

On the other hand, this Court must consider the far-reaching effects of allowing secret or masked witnesses to testify in Court.

In virtually every criminal case where a defendant is charged with a violent or assaultive offense, nearly every witness has some justifiable fear or reluctance to testify. Yet our constitution requires that those witnesses confront the person they are accusing face to face. If we allow witnesses to be masked and refuse to divulge their names whenever they are fearful for their safety, even if that fear is justifiable, our Court system will become a series of Star Chamber proceedings where a person is convicted based on the testimony of secret masked witnesses whose names he does not know.

The Prosecution's Petition conveniently ignores the total picture presented in this case, the cumulative effect these restrictions had on the right of confrontation. It may have been permissible not to require "Rick" to divulge his current home address, as a reasonable restriction that would on balance outweigh the need for that information. But in no stretch of the imagination can the total cloak of secrecy thrown over "Rick" be justified.

Our founding fathers established a right of confrontation in the Bill of Rights to protect us from these very abuses -- the government using secret witnesses against an accused person.

Finally, this Court should consider the very real possibility that something crucial about this witness's background has been hidden in this case. The defense was prevented from independently investigating this possibility at the initial hearing. The trial court had no ability to find out, as it was never told the witness's name.

The Michigan Court of Appeals has remanded for a new entrapment hearing, so that the defense can minimally investigate this possibility. It is now over four years later and any threat, if it existed at all, has certainly dissipated. Moreover, the opinion of the Michigan Court of Appeals still allows the trial court to fashion reasonable restrictions to protect the witness if necessary, as long as the procedures assure the reliability of the evidence. It would be a miscarriage of justice if this secret witness entrapped Respondent through reprehensible actions and lied on the witness stand, but as a result of his cloak of secrecy was allowed to hide significant facts that may have been crucial to the trier of fact in making a fair assessment of his credibility and truthfulness.

The current record is inadequate for this Court to make this determination. Only a hearing will provide us with answers. The decision of the Michigan Court of Appeals provides for such a hearing, and carefully balances the competing concerns.

For these reasons, Respondent asks this Court to deny the Petition for Writ of Certiorari, so that the trial court will have the opportunity to make that determination.

RELIEF REQUESTED

WHEREFORE, for the reasons stated, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari to the Michigan Court of Appeals.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: Ronald E. Steinberg

RONALD E. STEINBERG
Assistant Defender
Third Floor, North Tower
1200 Sixth Street
Detroit, Michigan 48226
(313) 256-2814

Dated: May 27, 1992